

## **T-5.2 SWANA Technical Policy**

### **FLOW CONTROL OF MUNICIPAL SOLID WASTE**

#### **Policy**

SWANA recognizes flow control as an effective and legitimate instrument of integrated municipal solid waste management. To the extent allowed by law and after public discussion- including the consideration of economic, environmental and social impacts, and input from residents, businesses, and other interested parties- flow control can be implemented without unduly interfering with free movement of municipal solid waste and recyclables across jurisdictional boundaries.

#### **Position**

##### **Introduction**

As importers, exporters, or sometimes as both, local governments and waste authorities throughout North America participate in the transportation of municipal solid waste across jurisdictional boundaries for treatment, recycling, energy production, and/or disposal. Some jurisdictions find their interests are best served by local solutions to waste management obligations, including the designation of local facilities for municipal solid waste handling or disposal.

##### **Background**

Flow control is a regulatory measure, typically a local governmental ordinance, rule or other official directive, requiring that municipal solid waste, recyclables, or other material be transported from the place where the material is generated to a designated facility for processing, recovery, transfer, energy production or disposal.

In *C&A Carbone v. Town of Clarkstown*, 511 U.S. 383 (1994), the U.S. Supreme Court struck down a law requiring all nonhazardous solid waste within the town limits, whether or not locally generated, to be transported to a town-designated, but privately owned and operated, waste processing facility. The town hired a private contractor to build a transfer station and operate it for five years, and to assure a sufficient flow of waste to the facility, passed the flow control measure. The high court found the town law discriminated against interstate commerce by bestowing a favored status on the single local waste processor and depriving competitors, including out-of-state firms, of access to a local market.

Following the Carbone ruling, some local governments were able to achieve similar results (that is, steering waste to a preferred facility) without flow control. They relied on competitive and negotiated contracts with haulers, franchising systems, and competitive pricing. The courts found these alternative approaches non-discriminatory, and upheld them if local benefits from facility designation outweighed effects on interstate commerce.

In *United Haulers Association v. Oneida-Herkimer Solid Waste Management Authority*, 127 S.Ct. 1786 (2007) the high court revisited the flow control issue, this time in a context where, unlike the Clarkstown transfer station, the designated facilities were publicly owned. In this case the court ruled that county ordinances requiring haulers to deliver locally generated waste to publicly owned waste facilities did not discriminate against interstate commerce. The majority opinion found that the ordinances merely enabled the counties to pursue traditional police (policy?) power functions and that the underlying policy choice (public sector waste handling) should be free from court interference. Analyzing the ordinances under the burdens-versus-benefits test, the court found that the public benefits of flow control outweighed whatever burden on commerce might exist.

Following the Oneida-Herkimer decision the SWANA International Board of Directors (IB) decided it was important for the Association to clarify its position on flow control and at its October 7, 2007 meeting issued the statement contained in Section I of this policy.

### **Considerations**

In clarifying its position on flow control SWANA recognized that it needed to consider its prior policy T-5.1 (Importation and Exportation of Municipal Solid Waste.) In T-5.1 SWANA supports the principle of free movement of municipal solid waste across jurisdictional boundaries as an article of commerce irrespective of origin, subject to traditional state, provincial and local government responsibilities.

T-5.1 expressly contemplates that the general principle of “free movement of municipal solid waste” necessarily has reasonable and appropriate limitations, and among them, practices favoring the public sector in the realm of traditional local government activity. “[L]aws that favor the government in such areas – but treat every private business, whether in-state or out-of-state, exactly, the same – do not discriminate against interstate commerce,” Chief Justice Roberts wrote in the *Oneida-Herkimer* majority opinion. Moreover, the public comment and participation called for in the flow control policy promotes an early-stage benefits-versus-burdens analysis, which every flow control measure must withstand in any court challenge. Based on these considerations, SWANA is satisfied that its flow control policy is consistent with T-5.1 and U.S. Supreme Court decisions.

Approved by the International Board  
on September 25, 2009.



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International Secretary

Dated October 8, 2009